United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7677, 7681

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RANDOLPH PHILLIPS,
Plaintiff-Appellee,

v.

JOHN E. TOBIN, FRED M. KIRBY, ALLAN P. KIRBY, JR., each in their own capacity as directors of Alleghany Corporation, and as attorneys for and guardians of the property of Allan P. Kirby, Sr., JOHN J. BURNS, JR.,
Defendants-Appellants,

RALPH K. GOTTSHALL, RICHARD R. HOUGH, WILLIAM G. RABE, CLIFFORD H. RAMSDELL, and CARLOS J. ROUTH, as directors of Alleghany Corporation,
Defendants,

and ALLEGHANY CORPORATION,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF ALLEGHANY CORPORATION

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February 20, 1976

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF APPELLANT ALLEGHANY CORPORATION

Defendant-appellant Alleghany Corporation ("Alleghany") submits this brief in support of its appeal, pursuant to 28 U.S.C. § 1291, from "so much of the order of the United States District Court for the Southern District of New York (Hon. Robert J. Ward, J.), dated November 5

and entered November 6, 1975, as denied Alleghany's motion to dismiss plaintiff Randolph Phillips' amended complaint on either of the grounds that Mr. Phillips, a layman, cannot prosecute *pro se* a derivative action on behalf of Alleghany or that Mr. Phillips is not an adequate representative plaintiff who may maintain a derivative action on behalf of Alleghany pursuant to Rule 23.1 of the Federal Rules of Civil Procedure." Messrs. John E. Tobin, Fred M. Kirby, Allan P. Kirby and John J. Burns ("the individual defendants"), all directors of Alleghany and the only other defendants served in this action, have also appealed.*

Judge Ward's decision of November 5, 1975 is reported at 403 F.Supp. 89 (S.D.N.Y. 1975) and is reproduced in the Joint Appendix ("J.A.") at pages 196a-208a. His further orders of January 20, 1976 appear at J.A. pp. 214a and 216a.

Issues Presented

1. Whether Mr. Phillips, a layman, may prosecute *pro se* a derivative action to enforce an alleged right of Alleghany.

2. Whether Mr. Phillips can provide the fair and adequate representation of the interests of Alleghany and its

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* Alleghany and the individual defendants noticed their appeals from Judge Ward's decision on December 5, 1975. On January 20, 1976, Judge Ward denied, without opinion, motions of Alleghany for clarification and of the individual defendants for reargument of aspects of his decision which are not involved in this appeal. Alleghany and the individual defendants filed on February 6, 1975 separate notices of appeal therefrom raising only the question posed by the initial appeals. These notices have been assigned Docket Nos. 76-4044 and 76-4045. Alleghany and the individual defendants have moved for consolidation of these appeals with those noticed on December 5, 1975.

stockholders which is required of a plaintiff in a derivative action by Fed.R.Civ.P. 23.1.

3. Whether this Court has jurisdiction under 28 U.S.C. § 1291 to determine issues (1) and (2) or either of them at this time.

On or about January 8, 1976 Mr. Phillips moved to dismiss the appeals in Dockets Nos. 75-7677 and 75-7681. On January 27, a panel composed of Judges Moore, Oakes and Meskill denied the motion without prejudice to Mr. Phillips' right to renew his jurisdictional objections at the hearing on the merits.

Statutes and Rules

Of particular relevance to the issues raised by these appeals are the provisions of Fed.R.Civ.P. 23.1 and of two sections of the Judicial Code, *viz.* 28 U.S.C. § 1291 and 28 U.S.C. § 1654. Their texts read as follows:

28 U.S.C. § 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. § 1654:

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

Fed. R. Civ. P. 23.1:

> "In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

Statement of the Case

A. Proceedings Below

Mr. Phillips commenced this action by filing a six-count complaint in the District Court on December 30, 1974. It charged the defendants other than Alleghany, all of whom

are or were directors of Alleghany, with a series of alleged violations of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.*

On March 6, 1975 Mr. Phillips filed an amended complaint (J.A. 13a-38a) which added a seventh count against defendants Tobin, Fred M. Kirby and Allan P. Kirby, Jr. This count, which has its ostensible jurisdictional foundation in diversity of citizenship, alleges that the matters canvassed in the complaint's first six counts also are actionable violations of State law. On March 17, 1975 Alleghany and the individual defendants filed answers (J.A. 39a-80a) denying the material allegations of the amended complaint.

The amended complaint, asserted derivatively, challenges in Counts One, Two, Three, Six and Seven Alleghany's acquisition in 1968 of the Jones Motor Company, Inc. ("Jones") and in Counts Four, Five and Seven Alleghany's alleged delay in 1969 in selling stock which it owned in the Penn Central. Counts One, Two, Four and Six attack the Jones transaction and the putative delay in selling Alleghany's Penn Central stock as violations of Investment Company Act, and Counts One, Three and Five charge that this conduct violated, in various respects, the Securities Exchange Act and Rules 10b-5 and 14a-9 thereunder. These allegations are interspersed with contentions that the individual defendants improperly procured the Interstate Commerce Commission's continuing regulation of Alleghany as a common carrier, thereby depriving Alleghany's stockholders of the "benefits" which would accrue if their company's affairs were supervised by the Securities and Exchange Commission under the Investment Company Act.

Mr. Phillips' pleading seeks various forms of injunctive relief against Alleghany and the payment by the defendant directors to Alleghany of damages estimated to total about $18,000,000. The relief demanded against Alleghany includes prayers that it divest itself of Jones, register under the Investment Company Act, and declare and distribute as dividends all net income received by Alleghany since 1969 and not heretofore paid out to stockholders (J.A. 36a-37a)—an amount in excess of $80 million (J.A. 176a).

Alleghany and the individual defendants moved for judgment on the pleadings pursuant to Fed.R.Civ.P.12(c) (J.A. 81a-84a). The motions contended, in substance, that some portions of Mr. Phillips' amended complaint failed to state claims upon which relief could be granted, that others were outside the subject matter jurisdiction of the District Court, and that still others were time barred or otherwise substantively defective. The motions also urged, distinct from the substantive merits of Mr. Phillips' allegations, two "capacity" or "standing" arguments which are the subject of this appeal, *viz.* that Mr. Phillips, who is not an attorney admitted to the practice of law in any jurisdiction (J.A. 37a), can not prosecute a derivative action *pro se* and that he is not an adequate representative plaintiff within the meaning of Fed.R.Civ.P. 23.1.

On November 5, 1975, Judge Ward issued his opinion and order (J.A. 196a-208a) dismissing the amended complaint except as it presented a fact question (J.A. 204a), *viz.* plaintiff's claim that the individual defendants Tobin, Fred M. Kirby and Allan P. Kirby caused Alleghany to pay an exorbitant price for Jones. Judge Ward rejected the two challenges to Mr. Phillips' personal capacity to maintain the derivative action as a *pro se* plaintiff or as a plaintiff at all, stating only:

> "Defendants raise a variety of challenges to Phillips' fitness to maintain this suit *pro se* under the strictures of Rule 23.1, Fed.R.Civ.P. These arguments . . . are rejected." (J.A. 208a).

The present appeals are from this determination.

B. Facts Relevant to Appeals

Alleghany has a substantial stake in whether this suit is prosecuted further and, if so, how and by whom. Under the law of Maryland, where it is incorporated, Alleghany is obligated to indemnify the individual defendants for their expenses if this suit fails. It should not have thrust upon it this burden, and the other burdens concomitant with any participation in large-scale litigation, if the plaintiff has no legitimate right to maintain the suit.

The first branch of Alleghany's appeal, which challenges Mr. Phillips' right to prosecute a derivative action *pro se*, raises, we submit, a categorical question of law. It turns on only two facts, which are established by the second paragraph and by the signature line of Mr. Phillips' amended complaint. He is not an attorney (J.A. 37a), and he is attempting to bring a derivative action on behalf of Alleghany (J.A. 13a).

The second branch of the appeal, the one which questions Mr. Phillips' adequacy under Fed.R.Civ.P. 23.1, brings a broader range of facts into play. None of them involves, however, an appraisal of the merits, or even the abstract validity, of Mr. Phillips' putative claims. In summary, the facts which bear on Mr. Phillips' adequacy as a representative plaintiff are:

Mr. Phillips' attempted role as a derivative plaintiff is tainted by several conflicts of interest. At the very time he is attempting to maintain this action on behalf of Alle-

ghany, he is prosecuting in the District Court for the Southern District another law suit in his personal capacity in which he is seeking to recover $94,500 of "legal fees" from Alleghany and from a corporate affiliate of Alleghany, Investors Diversified Services, Inc. (See J.A. 85a-94a)

Mr. Phillips' proposed role as plaintiff *pro se* also poses an additional conflict between the alleged interests of his "client" and his quite obvious concern for recovery of a "reasonable attorney's fee" as its "lawyer" (J.A. 37a). His complaint also includes some derivative claims which, if successful, would benefit Alleghany as an entity and another, *viz.* the disbursement by Alleghany of $80,000,000 in dividends (*compare* J.A. 37a *with id.* at 176a), which would benefit Mr. Phillips personally, but would cripple the company.

Mr. Phillips' role as putative champion of the interests of Alleghany and its stockholders is tainted, further, by his animus towards Alleghany or, more precisely, towards the individuals through whom the corporation acts. This hostility, well documented in the cases and evidenced in many appearances in this Court (J.A. 85a-158a), suggests that he is incapable of the dispassionate address to this law suit which should be required of a representative plaintiff.

Finally, Mr. Phillips' position as a *pro se* derivative plaintiff, if not absolutely disqualifying, should count—and count heavily—in the balance drawn under Rule 23.1. As the proprietor of an unlicensed "one-man law office," which is attempting to prosecute this derivative action at the same time he is pressing several other *pro se* personal actions (J.A. 85a-94a, 129a, 136a), Mr. Phillips cannot bring to bear the trained skill, time, and other resources which the proper prosecution of this case warrants—nor is he in the conduct of the litigation subject to the responsibilities which membership of the bar entails.

POINT I

Mr. Phillips, a Layman, May Not Prosecute a Derivative Action As a *Pro Se* Plaintiff.

Mr. Phillips, although not a member of the bar of this Court or of the Southern District or of any court, seeks as "attorney *pro se*" (J.A. 37a) "to enforce a right of [Alleghany]" Fed.R.Civ.P. 23.1, (and to collect "a reasonable attorney's fee" for so doing (J.A. 37a)). He is attempting to represent the interests of others—Alleghany and its many thousands of stockholders—and this, we submit, only an attorney can do. Mr. Phillips' derivative complaint should have been dismissed.*

The challenge we raise to a layman's capacity to prosecute a derivative action *pro se* was, so far as we can tell from the reported decisions, considered on only one occasion prior to Judge Ward's determination below. That earlier decision also involved Mr. Phillips. In *Willheim* v. *Murchison,* 206 F.Supp. 733 (S.D.N.Y. 1962), Judge Dawson sustain Mr. Phillips' right to appear as a *pro se* plaintiff in a derivative action brought on behalf of Investors Mutual, Inc., a mutual fund managed by a corporate affiliate of Alleghany.**

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* This argument is distinct from our challenge to Mr. Phillips' standing under Fed.R.Civ.P. 23.1. The argument pressed here would apply even if Mr. Phillips' attempted role as derivative plaintiff were not tainted by the conflicts of interest and other factors which disqualify him under Rule 23.1. Conversely, by reason of those factors, Mr. Phillips would be an inadequate derivative plaintiff within the meaning of the Rule even if he had chosen to file the present complaint through an attorney.

** The Mrs. Willheim of the caption is Mr. Phillips' mother-in-law. She was Mr. Phillips' co-plaintiff in the action and appeared by counsel. (206 F.Supp. at 734-35)

The issue presented in *Willheim* was "admittedly a novel one which has not heretofore been passed upon by this Court." (206 F.Supp. at 735) It received no appellate review at the time* and, so far as we are aware, did not, prior to this action, receive subsequent consideration in this or any other court. Although Judge Ward apparently followed *Willheim* without discussion, that case (and, by extension, this one) was, we submit, incorrectly decided. The Court's opinion in *Willheim* is based on a faulty analysis of the issue in question and was made without reference to, and apparently without knowledge of, cogently reasoned authorities which, in related contexts, reached contrary results.

In *Willheim* the Court reasoned that a derivative action "is the action of a stockholder even though it may be brought for the benefit of the corporation." (206 F.Supp. at 736) Since 28 U.S.C. § 1654 authorizes parties to "plead and conduct their own cases personally", it followed, according to this view, that a layman might appear *pro se* in a derivative stockholder's action.**

This analysis, we submit, confuses the question of a stockholder's procedural standing to file a derivative com-

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* This Court rejected an attempted appeal from Judge Dawson's decision on the ground that it was a non-appealable order. (312 F.2d 399 (2d Cir. 1963)) In deciding the issue of appellate jurisdiction, this Court relied on several authorities which have since been expressly overruled in *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974), a matter we consider in some detail in a later point of this brief. The capacity issue in *Willheim* ultimately evaporated by reason of the complaint's dismissal on other grounds. *Willheim* v. *Murchison*, 231 F.Supp. 142 (S.D.N.Y. 1964), *aff'd*, 342 F.2d 33 (2d Cir.), *cert. denied*, 382 U.S. 840 (1965).

** At the time of the *Willheim* decision, then Rule 23 (*i.e.* before its amendment in 1966) spoke in terms of "an action brought to enforce a secondary right on the part of one or more shareholders . . .". Present Rule 23.1, of course, addresses itself to the enforcement of "a right of a corporation".

plaint with the question of whose substantive right the complaint asserts. The substantive right is, of course, the corporation's. *E.g., Ross* v. *Bernhard,* 396 U.S. 531, 538-39 (1970); *Koster* v. *Lumbermens Mut. Cas. Co.,* 330 U.S. 518, 522 (1947); *Papilsky* v. *Berndt,* 466 F.2d 251, 255 (2d Cir.), *cert. denied,* 409 U.S. 1077 (1972). Mr. Phillips, as a layman, may not represent that right for at least two related reasons. It is not Mr. Phillips' substantive right to assert as his "own", and, notwithstanding 28 U.S.C. § 1654, a corporation may not appear except through an attorney, *e.g., Jackson* v. *Statler Foundation,* 496 F.2d 623, 626 (2d Cir. 1974); *Shapiro, Bernstein & Co.* v. *Continental Record Co.,* 386 F.2d 426 (2d Cir. 1967).

Courts repeatedly have recognized, in a variety of contexts, that a lay plaintiff who has undoubted representative capacity to assert others' interest may not avoid the requirement of proper counsel on the theory that the plaintiff is simply prosecuting "his" own case. Thus, in *Niklaus* v. *Abel Construction Co.,* 164 Neb. 842, 83 N.W.2d 904 (1957), the trial court dismissed a lay plaintiff's attempt to prosecute, *pro se,* a taxpayer's action "for the benefit of the City of Lincoln. . . ." The Supreme Court of Nebraska affirmed.

Noting that "taxpayers' suits are . . . analogous to stockholders' suits" (83 N.W.2d at 910), the court, per Simmons, C.J., stated:

> "The action is one brought for the benefit of the city of Lincoln, a municipal corporation. The causes of action are alleged to be its causes of action. The judgment sought, if recovered on the causes of action, would be the judgment of the city of Lincoln and no part thereof would be the judgment of Mr. Niklaus in his own person. *It is axiomatic that a corporation cannot appear in its own person. It must appear by a member of the Bar.*

"It is obvious that Mr. Niklaus is without authority to appear and represent the city of Lincoln as its lawyer in this litigation. That, however, is exactly the effect of what he did here.

* * *

"*Mr. Niklaus cannot, by the device of naming himself as a party plaintiff, convert this action into anything other than an action for the benefit of the city. Mr. Niklaus was without right to act as a member of the bar in this case. See Bay County Bar Ass'n* v. *Finance System, Inc.*, 345 Mich. 434, 76 N.W.2d 23, holding in effect that courts will not permit laymen to appear in court in a representative capacity and such a rule may not be circumvented by subterfuge.

"... [W]e adopt the language of the Supreme Court of Missouri in *Liberty Mutual Ins. Co.* v. *Jones*, 344 Mo. 392, 130 S.W.2d 945, 955, 125 A.L.R. 1149: '*While a layman may represent himself in court he cannot even on a single occasion represent another, whether for a consideration or not.*'" (83 N.W.2d at 910-11)*

To the same effect is the unanimous decision of the Supreme Court of Ohio in *Otto* v. *Patterson*, 173 Ohio St. 174, 180 N.E.2d 575, 575-76 (1962):

"The question presented is whether a taxpayer, not a licensed attorney, may initiate and prosecute a taxpayer's suit on behalf of others without the services of a licensed attorney.

"The plaintiff bases his claimed right to initiate and prosecute the action on Section 733.59, Revised Code, permitting suit by a taxpayer where the city solicitor fails to act. That section in no wise overrides or limits

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* Emphasis supplied here and elsewhere throughout unless otherwise indicated.

the provisions of Section 4705.01, Revised Code, prescribing who may practice law, or the rules of this court. *In the suit in question here, plaintiff is attempting to act as an attorney on behalf of the city of Dayton and for taxpayers therein other than himself. Such action constitutes an attempt by one, not a licensed attorney, to practice law contrary to the provisions of Section 4705.01 and the rules of this court.*"

Similarly, *pro se* plaintiffs cannot represent persons other than themselves in class actions. The 1974 Report of the Conference for District Court Judges, 64 F.R.D. 475, in treating this issue, simply stated:

> "The Seminar then turned to the question whether a pro se plaintiff can represent any other person and serve as a representative in a class action, and the clear opinion was that it is not permissible for a pro se plaintiff to represent any person other than himself." (*Id.* at 505)

There is more than a mere formalism at issue here. As the Court of Appeals for the Fourth Circuit wrote, when it refused, in *Oxendine* v. *Williams*, 509 F.2d 1405 (4th Cir. 1975), to allow a prisoner to bring a class action on behalf of fellow inmates:

> "Ability to protect the interests of the class depends in part on the quality of counsel, *Gonzales* v. *Cassidy*, 474 F.2d 67 (5th Cir. 1973), and we consider the competence of a layman representing himself to be clearly too limited to allow him to risk the rights of others. *Cf. Anderson* v. *Moorer*, 372 F.2d 747, 741 n.5 (5th Cir. 1967). Neither Oxendine nor any other prisoner has assigned error to the class aspect of this case, but it is plain error to permit this imprisoned litigant

> who is unassisted by counsel to represent his fellow inmates in a class action." (*Id.* at 1407)

See also *Jenkins* v. *Fidelity Bank,* 18 Fed. R. Serv.2d 90 (E.D.Pa. Jan. 7, 1974).

Similarly, trustees and executors, though proper parties to assert claims on behalf of their estates, may not do so except through an attorney. *State* v. *County Court,* 29 Wis.2d 1, 138 N.W.2d 162, 166-67 (1965); *Arkansas Bar Ass'n* v. *Union Nat'l Bank,* 224 Ark. 48, 273 S.W.2d 408, 410 (1954).

See also *Heiskell* v. *Mozie,* 82 F.2d 861 (D.C. Cir. 1936). The court there held that a real estate agent had standing to sue for rents of an undisclosed landlord-principal, but could do so only through an attorney. The court said:

> "While, therefore, the right to manage one's own cause personally is preserved and secured in all courts, federal and state, the right has never been enlarged to include—by appointment or substitution—an agent. *The question is whether the person offering to conduct the litigation is the real party in interest. To determine this, courts look through the shadow to the substance."* (*Id.* at 863)

Speaking of the contemporaneous codification of what now is 28 U.S.C. § 1654, the court also said:

> "We think the words 'the parties,' as used in the statute, mean the parties in interest—the real, beneficial owners of the claims asserted in the suit, and by implication that it excludes agents and attorneys in fact and confines the representation, *where the party whose rights are actually involved does not appear in person,* to attorneys and counselors at law." (82 F.2d at 863)

Willheim's basic theory, *viz.* that Mr. Phillips, when he sues derivatively, is prosecuting "his" suit, not the corporation's, conflicts, not only with the authorities discussed above, but with federal practice concerning other aspects of derivative litigation.

Thus, a derivative plaintiff is not open to personal defenses or counterclaims inasmuch as he is not an "opposing party" within the meaning of Fed.R.Civ.P. 13. *Tryforos* v. *Icarian Development Co.*, 49 F.R.D. 1 (N.D.Ill. 1970); *Cravatts* v. *Klozo Fastener Corp.*, 15 F.R.D. 12, 13 (S.D.N.Y. 1953); *Higgins* v. *Shenango Pottery Co.*, 99 F.Supp. 522 (W.D.Pa. 1951); *Shane* v. *Ohlstein*, 24 App. Div.2d 742, 263 N.Y.S.2d 532 (1st Dept. 1965). Analogously, wrongs committed by the plaintiff against the corporation do not constitute a defense. *Shane* v. *Ohlstein*, *supra*.

The amount in controversy, for purposes of federal jurisdiction, 28 U.S.C. §§ 1331, 1332, is determined, not by reference to the shareholder-plaintiff's "stake" in the outcome, but by reference to the corporation's. *Koster* v. *Lumbermens Mut. Cas. Co.*, *supra*, at 523 (1947). Similarly, venue is determined with reference to where the corporation might have sued the same defendant. See 28 U.S.C. § 1401. And the right to a jury trial is determined by reference to whether the corporation, had it brought suit, would be entitled to a jury. *Ross* v. *Bernhard*, *supra*, at 532-33.

Legal fees in a derivative suit are recoverable only to the extent that the action benefited the corporation, as opposed to the derivative plaintiff. *Pioche Mines Consolidated, Inc.* v. *Dolman*, 333 F.2d 257 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965); *Saltzman* v. *Technicolor, Inc.*, 51 F.R.D. 178 (S.D.N.Y. 1970); *Liman* v. *Midland Bank Ltd.*, 309 F.Supp. 163 (S.D.N.Y. 1970). Conceptually,

these fees are paid *by* the corporation, not the other defendants, out of or for the benefits which the derivative suit conferred on the corporation. Normally, of course, a plaintiff who successfully asserts a personal claim recovers no attorneys' fees at all.

A judgment (or judicially approved settlement) is *res judicata* as against the bringing of another derivative suit in the same cause of action, even if brought by another plaintiff. *Armstrong* v. *Frostie Company*, 453 F.2d 914 (4th Cir. 1971); *Rosenfeld* v. *E. R. Black*, 336 F.Supp. 84 (S.D.N.Y. 1972); *Saylor* v. *Lindsley*, 274 F.Supp. 253 (S.D.N.Y. 1967); *Breswick & Co.* v. *Briggs*, 135 F.Supp. 397 (S.D.N.Y. 1955); *Liken* v. *Shaffer*, 64 F.Supp. 432 (N.D. Iowa 1946); *Ratner* v. *Paramount Pictures*, 6 F.R.D. 618 (S.D.N.Y. 1942); *LaHue* v. *Keystone Investment Company*, 496 P.2d 343 (Wash.App. 1972).

In short, to permit a layman to prosecute a derivative action on behalf of a corporation is to disregard the compelling reasons of principle which require the representation of corporations by attorneys. Judge Leibell once stated them in *Brandstein* v. *White Lamps, Inc.*, 20 F.Supp. 369, 370-71 (S.D.N.Y. 1937):

> "'Were it possible for corporations to prosecute or defend actions in person, through their own officers, men unfit by character and training, men, whose credo is that the end justifies the means, disbarred lawyers or lawyers of other jurisdictions would soon create opportunities for themselves as officers of certain classes of corporations and then freely appear in our courts as a matter of pure business not subject to the ethics of our profession or the supervision of our bar associations and the discipline of our courts.'" *

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* Quoting with approval, *Mortgage Commission* v. *Great Neck Improvement Co.*, 162 Misc. 416, 422, 295 N.Y.Supp. 107, 114 (Sup.Ct. Nassau Co. 1937).

Mr. Phillips' attempted appearance on behalf of Alleghany in this case deserves no greater indulgence.

POINT II

Mr. Phillips Cannot Provide the Fair and Adequate Representation Required by Civil Rule 23.1.

A derivative plaintiff is a self-appointed fiduciary who gives to himself the capacity to inflict substantial harm on the corporation and the shareholders he presumes to represent while purporting to confer upon them substantial benefits. Fed.R.Civ.P. 23.1 protects these interests from the real dangers posed by an unfit volunteer by requiring that the derivative plaintiff be one who can "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation . . . ."

The significance of the derivative plaintiff's fiduciary role was stated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549-50 (1949):

> "[A] stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. . . . He is a self-chosen representative and a volunteer champion. The Federal Constitution does not oblige the state to place its litigating and adjudicating processes at the disposal of such a representative, at least without imposing standards of responsibility, liability and accountability which it considers will protect the interests he elects himself to represent."

Mr. Phillips, we submit, is unable to meet the requirement of Rule 23.1 for several reasons. *First*, he is subject to several conflicts of interest—those arising from his

simultaneous prosecution of this action and of an action in his personal capacity against Alleghany and an Alleghany affiliate; from his pursuit of "attorneys' fees" in this action; and from his attempted pursuit in this action of claims which would redound, not to Alleghany's benefit, but to his own personal benefit.

Second, Mr. Phillips' history of litigation, one which has often brought him to the bar of this Court, demonstrates an animus towards Alleghany and those affiliated with it which suggests that motives entirely personal to Mr. Phillips' account for this action and will influence its manner of prosecution. This may be a burden which Alleghany and its officers must bear when Mr. Phillips is asserting his personal claims. It is not, however, a litigation dynamic which should not be inflicted upon the corporation and its stockholders when it is their alleged claims which Mr. Phillips is asserting.

Third, even if Mr. Phillips' status as a layman is not (as we think it should be) a categorical bar to his attempted role in this case, it is a factor which should weigh in the calculus under Rule 23.1. He cannot, we submit, provide Alleghany, his putative client, with the competent representation which a case of this complexity would warrant, nor is Alleghany protected against his conduct by the professional discipline applicable to a member of the bar. Moreover, Mr. Phillips has committed his unlicensed "one-man law firm" to so many other litigations, besides this one, that he may be unable to give it the attention a fiduciary should.

A. Mr. Phillips' Conflicts of Interest

Mr. Phillips currently is a *pro se* plaintiff in a lawsuit pending against an Alleghany affiliate, Investors Diversified Services, Inc., in which Alleghany itself is a named

defendant.* This is the so-called "fee litigation", *Phillips* v. *Investors Diversified Services, Inc.*, S.D.N.Y. 72 Civ. 1544 (CHT), described at J.A. 85a-94a, in which Mr. Phillips is seeking a personal recovery for "legal fees" of $94,950. This figure represents the alleged value of his services and expenses in his *pro se* defense of himself in an earlier litigation prosecuted *sub nom. Alleghany Corp.* v. *Kirby*, 218 F.Supp. 164 (S.D.N.Y. 1963), *aff'd*, 333 F.2d 327 (2d Cir. 1964).

The danger that Mr. Phillips' prosecution of this case will be influenced by his desire to achieve a favorable result in the "fee litigation" is obvious. The limited proceedings had in this case have demonstrated the potential which Mr. Phillips discerns for advancing his personal interest in the "fee litigation." The present complaint was filed just 10 days after defendant IDS had filed a still pending motion to dismiss and/or for summary judgment in the "fee litigation." The timing of the present complaint—one filed years after the widely publicized actions which it assails, but a mere ten days after the service of a dismissal motion in the "fee litigation"—indicates the role of the present case as a tactical weapon in Mr. Phillips' personal vendetta.

The interlock between the case at bar and the "fee litigation" is further demonstrated by the timing of Mr. Phillips' discovery demands in this action. On February 18, 1975, Judge Tenney signed a broad protective order in the "fee litigation" which not only vacated Mr. Phillips' notice to depose Fred M. Kirby (an officer of IDS and a defendant in this action) but also, for good and sufficient reason, pro-

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* Alleghany was dismissed from the suit on September 25, 1972 for lack of subject-matter jurisdiction. This Court dismissed Mr. Phillips' appeal for failure to prosecute. (J.A. 86a) Since no order was entered under Fed.R.Civ.P. 54(b), Alleghany remains, in some sense, a party to that action.

hibited Mr. Phillips from communicating (except through IDS' attorneys) with IDS or with Alleghany or its officers, directors, employees or agents as to the matters involved in the "fee litigation." (J.A. 92a-93a) The very next day Mr. Phillips served by mail a notice to examine in this case the same Fred M. Kirby, his brother, Allan P. Kirby, Jr., and defendant Tobin, a long-time counsel for Alleghany whom Mr. Phillips had accused of being chiefly responsible for IDS' failure to pay the "legal fees" claimed by Mr. Phillips (J.A. 93a).

While Judge Ward stayed the proposed discovery in this case, the synchronization of the actions taken by Mr. Phillips in this case and of the procedural steps taken by him in the "fee litigation" appears to be more than mere coincidence. Indeed, it is persuasive evidence that Mr. Phillips' purported representation of Alleghany and its shareholders is tainted by a personal stake of the kind which Rule 23.1 renders disabling.*

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* At the time Alleghany filed its dismissal motion before Judge Ward, Mr. Phillips' wife was prosecuting (with the aid of counsel) a derivative action on behalf of a mutual fund which has IDS as its investment advisor. *Phillips* v. *Bradford*, 73 Civ. 2118 (S.D.N.Y.). The complaint asserted claims about purchases and sales of Penn Central stock which also are alleged in portions of the present complaint which Judge Ward dismissed. (J.A. 207a) Judge Werker has since dismissed that action for plaintiff's failure to reimburse IDS for $1,583 of costs. Judge Werker also dismissed the action on the alternative ground that the plaintiff was a "woefully inadequate representative" of the mutual fund. (Opinion of May 23, 1975 at p. 4) As stated therein:

> "Here plaintiff has boldly announced her refusal to vigorously prosecute this action if expenditure of more than a few hundred dollars is required; rather than pay $1,583, she prefers dismissal as to one defendant with its attendant loss of the opportunity to obtain what her counsel describes as "millions of dollars" for the corporation. It follows therefore that the action fails to meet the requirements of Rule 23.1 and cannot be maintained by Mrs. Phillips." (*Id.* at p. 6)

The courts have recognized, as a danger to be avoided, the likelihood that a representative plaintiff with conflicting interests may use his derivative action as a vehicle to advance goals other than the relief ostensibly being sought. Thus, in *In re Value Line Special Situations Fund Litigation,* [1973-74 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 94,601 (S.D.N.Y. 1974) (CHT), it was held that a plaintiff (although not appearing *pro se*) could not fairly and adequately represent the interests of the shareholders because he would be willing to forego the prosecution of the derivative action in exchange for the discontinuance of a libel claim pending against him. See also *Nolen* v. *Shaw-Walker Co.*, 449 F.2d 506, 509-510 (6th Cir. 1971); *duPont* v. *Wyly*, 71 F.R.D. 615, 622 (D.Del. 1973).

There is the further conflict arising from the fact that Mr. Phillips is trying in this case to fill the role of both derivative plaintiff and attorney. As this Court noted in *Saylor* v. *Lindsley*, 456 F.2d 896, 900 (2d Cir. 1972):

> "There can be no blinking at the fact that the interests of the plaintiff in a stockholder's derivative suit and of his attorney are by no means congruent. While, in a general sense, both are interested in maximizing the recovery this is only a half-truth. Even apart from special considerations which, as has been noted, may cause special divergence of interest in cases where extremely large amounts are at stake, . . . there is a difference in every case. The plaintiff's financial interest is in his share of the total recovery less what may be awarded to counsel, *simpliciter*; counsel's financial interest is in the amount of the award to him less the time and effort needed to produce it. A relatively small settlement may well produce an allowance bearing a higher ratio to the cost of the work than a

> much larger recovery obtained only after extensive discovery, a long trial and an appeal." (citations omitted)

In class actions maintained pursuant to Fed.R.Civ.P. 23, this same conflict also has been recognized as disqualifying. In *Stull* v. *Pool*, 63 F.R.D. 702 (S.D.N.Y. 1974), the court held that a wife was not an appropriate class representative when her husband was a member of the firm representing the class, saying

> "The potential conflict of interest inherent in this situation is obvious. . . . [T]he difficulty I have with this situation lies in the fact that the possible recovery of Mrs. Stull as a member of the class is far exceeded by the financial interest she and her husband, as a marital unit, might have in the legal fees engendered by this lawsuit." (63 F.R.D. at 704)

See also *Cotchett* v. *Avis Rent A Car System, Inc.*, 56 F.R.D. 549, 554 (S.D.N.Y. 1972); *Shields* v. *Valley National Bank*, 56 F.R.D. 448, 450 (D.Ariz. 1972); *Eovaldi* v. *First National Bank*, 57 F.R.D. 545, 546 (N.D.Ill. 1972); *Graybeal* v. *American Savings & Loan Ass'n*, 59 F.R.D 7 (D.D.C. 1973).

The fact that the instant litigation is a derivative action under Rule 23.1, rather than a class action under Rule 23, does not alter the nature of the conflict between the interests Mr. Phillips seeks to represent as plaintiff and his separate interests as "counsel." Nor should the formal differences between derivative and class actions vary the conclusion that the same person cannot serve as both a representative plaintiff and as counsel for himself.*

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* "[M]any of the factors that are considered when determining the adequacy of representation in a class action under Rule 23 also

B. Mr. Phillips' Animus Towards Alleghany

The record includes a survey (J.A. 85a-158a) of Mr. Phillips' history of litigation against Alleghany and those associated or affiliated with it—a record so long and protean as to defy succinct description. These acrimonious and largely unsuccessful lawsuits, many of which have found their way to this Court, have been freely laced with charges of fraud and other chicanery against the accused defendants and of bias and prejudice against those jurists who have presumed to rule against these allegations.* They demonstrate that Mr. Phillips bears a personal animus toward Alleghany and those associated with it which is likely to color his judgment in the prosecution of the case at bar.

In *duPont* v. *Wyly, supra,* the court held that a plaintiff was an inadequate class representative for much the same reason, stating:

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should apply in the context of derivative suits." 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1833 at 393 (1972). See also *Papilsky* v. *Berndt, supra; In re Value Line Special Situations Fund Litigation, supra,* and *Caan* v. *Kane-Miller,* S.D.N.Y. 71 Civ. 873 (WCC) (Decision of Dec. 18, 1974), all of which cases apply class action adequacy decisions as authorities in derivative actions. See also Judge Cannella's comment in *Sweet* v. *Bermingham,* 65 F.R.D. 551 (S.D.N.Y. 1975), that in a derivative action "where a representative party also serves as counsel, or co-counsel, for the purported class, a conflict of interest clearly arises." (*Id.* at 555)

* See, *e.g., Smith* v. *Fitzsimmons,* 264 F.Supp. 728, 734 (S.D. N.Y. 1967), *aff'd sub nom. Smith* v. *Alleghany Corp.,* 394 F.2d 38 (2d Cir.), *cert. denied sub nom. Smith* v. *Kirby,* 393 U.S. 939, 1968 (J.A. 101a); *Phillips* v. *Murchison,* 252 F.Supp. 513, 519 (S.D.N.Y. 1966) (J.A. 122a-123a); *Phillips* v. *Bradford,* 228 F.Supp. 397, 401-02 (S.D.N.Y. 1964) (J.A. 125a-126a); *Glicken* v. *Bradford,* 35 F.R.D. 144, 158-59 (S.D.N.Y. 1964) (J.A. 115a). See also J.A. 137a-138a.

> "Within a period of months Mr. duPont initiated judicial proceedings against UCC on four separate claims. These facts do not, of course, bar Mr. duPont from pressing the claims here involved on his own behalf. They do indicate that situations may arise in the course of this lawsuit in which the judgment brought to bear by Mr. duPont could be influenced by considerations foreign to the interests of the class. For example, if Mr. duPont has a desire to wage war with those who control UCC, he would be less favorably disposed than other members of the class to any overtures of settlement." (61 F.R.D. at 622)

The problems which were foreseen in *Wyly* and averted by disqualifying that would-be representative plaintiff seem present here in a similarly disqualifying abundance.

C. Mr. Phillips' Other Disqualifying Factors

Courts consistently have required that the attorney for a representative litigant show himself qualified to carry the case forward. See, *e.g.*, in the context of a class action, *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968) ("To be sure, an essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation."); *Oxendine* v. *Williams, supra* (*pro se* layman cannot represent class); *Jenkins* v. *Fidelity Bank, supra; O'Connor* v. *G.C.A. Corp.*, [1973 Transfer Binder] CCH Fed.Sec.L.Rep. ¶ 94,057 (S.D.N.Y. 1973); *Jeffrey* v. *Malcolm*, 353 F.Supp. 395 (S.D.N.Y. 1973); *Shields* v. *Valley National Bank, supra*, at 449-50 (D. Ariz. 1972).

Since Mr. Phillips is attempting in this case to be both litigant and lawyer, Rule 23.1 would seem to make his

capacity in the latter role an element of his fitness in the former. And, on that score, it seems clear that Mr. Phillips, even though he can file a complaint which is resistant, in part, to demurrer, cannot be expected to properly prosecute *pro se* the claims he asserts. It is no answer to suggest, as Mr. Phillips has in earlier briefings, that if he "wins" he is fit and if he "loses" it makes no difference. Litigation, if sport to the courthouse buff, is a burden, in terms of both expense and inconvenience, to most of those, including Alleghany, who must participate in it.

The dangers implicit in Mr. Phillips' role as Alleghany's self-appointed counsel are aggravated in this case by the many other demands which Mr. Phillips has imposed on his unlicensed "one-man law office." He is, of course, involved in his "fee litigation." Additionally, he has pending in the Southern District a suit for damages against the American Stock Exchange, *Phillips* v. *American Stock Exchange*, 72 Civ. 5361 (MEL) (S.D.N.Y.) (see J.A. 136a) and an action in the courts of the District of Columbia which seeks to oust Gerald Ford from the Presidency and recover his salary payments for the Treasury, *Phillips* v. *Nixon*, 74 Civ. 736 (D.D.C.) (see J.A. 134a).*

The point, in last analysis, is simple. Mr. Phillips is, on so many counts, an unfit derivative plaintiff, that Rule 23.1, if it is to mean anything, should be enforced to bar his prosecution of these derivative claims.

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* At the time Alleghany filed its motion below, Mr. Phillips was appealing to the Court of Appeals for the District of Columbia Circuit from an order of the District Court dismissing the complaint. The Court of Appeals has since affirmed (*Phillips* v. *Ford*, D.C. Cir. No. 74-2060 (Jan. 21, 1976)), but Mr. Phillips' time to petition the Supreme Court for a writ of certiorari has not, we understand, expired.

POINT III

Alleghany's Appeals Are Properly Before This Court.

These appeals have already faced, and presumably will face again, a jurisdictional challenge. We submit that, despite the continued pendency, undecided, of a "fact question" (J.A. 204a) in the District Court, Alleghany may have, and should have, review at this time of the serious questions which it poses as to Mr. Phillips' capacity to pursue this action as a derivative plaintiff *pro se* or as a derivative plaintiff at all. To this demonstration we now turn.

A. Mr. Phillips' Capacity to Act *Pro Se*

This Court's recent decisions applying the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan*, 337 U.S. at 546, make it clear that Alleghany's categorical challenge to Mr. Phillips' attempted role as its uninvited attorney in this case raises a discrete question, distinct from the underlying merits, which this Court may review at this stage of the action. See *J. P. Foley & Co., Inc.* v. *Vanderbilt*, 523 F.2d 1357, 1359 (2d Cir. 1975); *Hull* v. *Celanese Corp.*, 513 F.2d 568, 570-71 (2d Cir. 1975); *Ceramco, Inc.* v. *Lee Pharmaceuticals*, 510 F.2d 268, 270-71 (2d Cir. 1975); *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 644 (2d Cir. 1974); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800, 805-06 (2d Cir. 1974).

These cases hold that orders either denying or granting motions to disqualify a party's attorney result in orders which are immediately appealable under the "collateral order" doctrine. The factors which we think disqualifies Mr. Phillips in this case are not, to be sure, identical with

the factors which grounded the disqualification claims in the cited cases. This is, however, a distinction without a difference in terms of the jurisdictional issue herein. The ultimate question is the same. Should Mr. Phillips be permitted to act as an attorney-plaintiff in this case? The parties should find that out now, and not after years and much money have been spent at the District Court level.

As this Court wrote in *Silver Chrysler Plymouth, Inc., supra:*

> "Now in 1974 we believe that *Cohen* requires a return to the wisdom of *Harmar* and so we uphold the appealability of an order denying disqualification, just as we have long upheld the appealability of an order granting this. . . . [T]he order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief.
>
> "It would seem to be appropriate at this time to dispel the needless uncertainty as to the law and procedure relating to the appealability of disqualification orders. All three prerequisites of *Cohen* are met. Since this is so, there is no reason not to follow the mandate of the Supreme Court and adopt their decision, namely:
>
> > " 'We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.'
>
> "By holding such an order directly appealable, we eliminate the uncertainties (and the paperwork) attendant to resorting to §1292(b) and/or §1651. Since the ultimate objective is to bring before an appellate court an important question which, if unresolved,

might well taint a trial, why should not this question be presented before judicial and attorney time may have been needlessly expended?" (496 F.2d at 805-06)

In urging that Judge Ward's ruling is, under contemporary authorities, immediately reviewable, we recognize that this was not always the case. As we have noted previously (see p. 10, fn. *, *supra*), the precise question of appellate jurisdiction which this branch of Alleghany's appeal poses was before this Court in *Willheim* v. *Murchison,* 312 F.2d 399 (2d Cir. 1963), which dismissed an appeal from Judge Dawson's decision reported at 206 F.Supp. 733 (S.D.N.Y. 1962). This Court then held, in a brief *per curiam* opinion, that an appeal did not lie from the District Court's pre-judgment order refusing to bar Mr. Phillips from prosecuting a derivative action *pro se.* At that time this Court wrote:

"PER CURIAM.

"We hold that the case is governed by *Fleischer* v. *Phillips,* 2 Cir., 264 F.2d 515, *cert. denied* 359 U.S. 1002, 79 S.Ct. 1139, 3 L.Ed. 2d 1030, and *Marco* v. *Dulles,* 2 Cir., 268 F.2d 192, and accordingly dismiss the appeal." (312 F.2d at 399)

The two cases upon which the *Willheim* Court relied were expressly overruled by *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.,* 496 F.2d 800 (2d Cir. 1974), the case which is the fountainhead of the current view. (See 496 F.2d at 806.) Thus, it is plain that review of the bizarre role Mr. Phillips is attempting to fill in this case can be entertained at this time.

B. Mr. Phillips' Capacity Under Rule 23.1

The reasoning of *Silver Chrysler Plymouth, Inc., supra,* and its progeny also supports an immediate review of the issue of plaintiff's adequacy. Alleghany's challenge under Rule 23.1 raises a discrete issue, distinct from the merits, and, in a practical sense, must be reviewed now if it is ever to be subject to effective appellate consideration.

If Alleghany's directors are successful in their defense of this action, Alleghany will be obligated under the law of Maryland, its state of incorporation, to indemnify them for the expenses of their defenses. During the pendency of a suit of this character, Alleghany's executives will be distracted and its affairs complicated by the burdens of litigation. Ultimate vindication is no substitute for an early escape from a litigation which this plaintiff, for reasons peculiar to himself, has no right to prosecute in a representative capacity. Mr. Phillips' rights in this regard are in serious question and that question is sufficiently separable from the content of Mr. Phillips' claims to justify immediate review under the "collateral order" doctrine.

CONCLUSION

Alleghany's appeal should be granted, and so much of the order of the District Court as is appealed from should be reversed.

Respectfully submitted,

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February 20, 1976

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

Robert Belluscio, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 20th day of February, 1976, I served the annexed Brief and Joint Appendix upon:

Debevoise, Plimpton, Lyons & Gates
299 Park Avenue
New York, New York 10017

Mr. Randolph Phillips
30 East 72nd Street
New York, New York 10021

by depositing true and correct copies thereof in the letter drop maintained by the United States Postal Service at 80 Pine Street, New York, New York 10005, enclosed in stamped, sealed envelopes addressed to the above-mentioned attorneys and party.

Robert Belluscio

Sworn to before me this
20th day of February, 1976

Robert R. Cawthra, Jr.
Notary Public

ROBERT R. CAWTHRA, JR.
Notary Public, State of New York
No. 31-0509710
Qualified in New York County
Commission Expires March 30, 1977